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IN THE

Supreme Court of the United States

October Term, 1964

No. 683

NICHOLAS LESSA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HENRY K. CHAPMAN
Attorney for Petitioner
Nicholas Lessa
335 Broadway
New York, New York 10013

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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Petitioner, Nicholas Lessa, prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Second Circuit, entered in the above case (sub nom. *United States* v. *Aviles,* No. 370, September Term, 1963, argued April 16, 1964, decided October 16, 1964, Docket No. 27377) on October 16, 1964 (Marshall, Circuit Judge, dissenting).

This is a companion petition with petitions of several other petitioners who were appellants in the *Aviles* case, *supra,* in the Court below.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit in support of the order and judgment entered October 16, 1964, is not yet officially reported. The

prior opinion of the United States Court of Appeals for the Second Circuit which is adhered to by that Court is reported at 315 F. 2d 186. The two relevant opinions of the United States District Court for the Southern District of New York are reported at 197 F. Supp. 596 and 200 F. Supp. 711.

Jurisdiction

The order and judgment of the United States Court of Appeals for the Second Circuit was entered October 16, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Petitioner, Nicholas Lessa, adopts the respective "Questions Presented" in the companion petitions for certiorari which are being filed on behalf of the other petitioners in this case.

Specifically, petitioner, Lessa, presents the following questions:

1. Upon remand by this Court to the United States Court of Appeals for the Second Circuit requesting it to reconsider its decision (315 F. 2d 186) in light of *Campbell* v. *United States,* 373 U.S. 487, and for further consideration as may be appropriate (375 U.S. 32, 33), did the Court below err in determining that the interview notes of Assistant United States Attorney Shaw were not producible under 18 U.S.C. §3500?

2. Was the determination by United States District Judge Thomas F. Murphy that the said Shaw notes were

producible under 18 U.S.C. §3500 (200 F. Supp. 711) "clearly erroneous" under the doctrine of *Campbell* v. *United States, supra,* so as to allow the Court below to reach a contrary conclusion?

Constitutional and Statutory Provisions Involved

This case involves the Due Process Clause of the Fifth Amendment to the Constitution of the United States as well as 18 U.S.C. §3500. Leave is requested to omit the printing of these as well as of the opinion below because they are to be printed in the companion petition of Vito Genovese.

Statement of the Case

Petitioner, Nicholas Lessa, and the other petitioners, were convicted on April 17, 1959, of conspiracy to violate the Federal narcotic laws after a jury trial of three months in the United States District Court for the Southern District of New York. The convictions were affirmed by the United States Court of Appeals for the Second Circuit (274 F. 2d 179), and this Court denied certiorari (*Evola* v. *United States,* 362 U.S. 974, 982, rehearing denied, *Genovese* v. *United States,* 363 U.S. 858).

On August 26, 1960 the petitioners including this petitioner moved in the United States District Court for the Southern District of New York for a new trial pursuant to Rule 33, F. R. Cr. P. The bases of the application were summarized in the opinion of the Court below in its original affirmance of the orders denying the motions for a new trial, and are stated at 315 F. 2d at p. 188 as follows:

> "* * * (1) alleged recantations of trial testimony by the principal government witness, Nelson Cantellops; (2) statements by Cantellops at the hearing on the motions for a new trial which were allegedly inconsistent with his original testimony; (3) allegedly new extrinsic evidence tending to establish Cantellops' perjury in his trial testimony concerning a certain trip to Las Vegas, Nevada; (4) alleged concealment at the trial of a rent record in the possession of the Government; (5) alleged post trial statements by Cantellops which tended to discredit his trial testimony; (6) alleged spoliation of notes of Federal Narcotics Agents Rowan, Consoli and Muglia, in violations of the Jencks Act, 18 U.S.C. §3500; and (7) failure of the Government to make available to the trial court certain interview notes of Assistant United States Attorney Donald H. Shaw, which notes were allegedly producible under the Jencks Act, 18 U.S.C. §3500."

Pursuant to petitions for certiorari seeking review of the order and judgment of affirmance of the Court below, this Court remanded the cases requesting "reconsideration in light of *Campbell* v. *United States*, 373 U.S. 487" and "such further consideration as may be appropriate," 375 U.S. 32, 33.

Upon remand the Court below adhered to its original affirmance of the denials of the motions for a new trial.

In connection with the Shaw notes the Court below followed the procedure of Judge Murphy, and divided the material into three groups, the second and third of which are as follows:

> "(2) Materials which were 'probably Jencks' statements.' Judge Murphy ruled that the nonpro-

> duction of this second group of materials, into which was placed 'the great majority' of Shaw's original interview notes, was nonprejudicial to appellants on the ground that 'virtually the[ir] entire contents' 'correspond[ed] with the grand jury testimony of Cantellops which was turned over to the defense.'
>
> (3) Notes which 'most assuredly should have been produced pursuant to §3500.' This group consisted of handwritten notes dated October 10 and 11, 1957. Although these notes contained new impeaching information not otherwise available to appellants, Judge Murphy ruled that nonproduction of these notes did not prejudice defendants' interests, in that defendants' cross-examination of Cantellops was not 'unduly restricted' thereby: . . .'' 315 F. 2d 186, 188-89.

The Court below held upon remand that the Shaw notes were not producible material pursuant to 18 U.S.C. §3500 (the ''Jencks Act''); Circuit Judge Marshall dissenting.

The majority took the position that Judge Murphy's holding that the Shaw notes ''set forth in substance what the witness said'' (200 F. Supp. 711, 715) was not the proper test and was a mistaken view of the law. Therefore, ''the limited review of a district judge's findings prescribed by *Campbell II* does not apply, and, in consequence, we were free to determine the facts for ourselves.''

It made a distinction between the phrases ''set forth in substance'' and a ''substantially verbatim recital.'' It held that only if a statement was a ''substantially verbatim recital'' was the Court of Appeals limited by *Campbell II*, to the acceptance of such a finding of a district judge, unless it was clearly erroneous.

The Court below then continued, holding that its former decision was not inconsistent with *Campbell II*, and that the Shaw notes were not a "substantially verbatim recital" of Cantellops' story and "a new trial on account of the government's failure to produce them was rightly refused." The Court of Appeals once again made an independent finding that the Shaw notes were not producible.

Judge Marshall in his dissenting opinion, held that Judge Murphy did not use the wrong standard of law in determining whether the Shaw notes were "statements" and producible under the Jencks Act. He took the position that Judge Murphy's finding that the Shaw notes "set forth in substance what the witness said" is nothing less than a paraphrase of "substantially verbatim recital."

Judge Marshall continued that, in any event, even if Judge Murphy used the wrong standard of law, which he was not willing to concede, the majority of the court was in error in holding it was "free to determine the facts for ourselves." He maintained that in such situation the Court of Appeals was bound "to vacate the judgment of the district court, state the correct standard of law that should be employed by the district court and order a remand to the district court to make the appropriate findings of fact (Cf. *Rogers* v. *Richmond*, 365 U.S. 534 (1961); *Townsend* v. *Sain*, 372 U.S. 293 (1963)."

Reasons for Granting the Writ

(1) This case is now back before this Court for a second time in connection with the producibility of the Shaw interview notes pursuant to 18 U.S.C. §3500 (Jencks Act). There

is presented a very serious question concerning the administration of justice and due process, arising from the failure of the Government to make available to defense counsel during trial said notes for the purpose of cross-examination and impeachment of the witness, Cantellops, who occupied the central and principal role for the Government. The Court of Appeals for the Second Circuit has again made an independent factual finding and a de novo determination that the notes are not producible under the Jencks Act. Such a determination seems to be in conflict with this Court's decision in *Campbell* v. *United States, supra*. In that case, this Court referring to an Interview Report stated:

> "We think these questions properly are ones of fact, the determination of which by the district judge may not be disturbed unless clearly erroneous."

The majority of the Court below, as pointed out by Circuit Judge Marshall in his dissenting opinion, has avoided the effect of the "clearly erroneous" doctrine by holding that Judge Murphy used a wrong standard of law in finding the notes producible.

Petitioner emphasizes, as stated by Judge Marshall, that Judge Murphy meant nothing more by the phrase "set forth in substance what the witness said" than a "substantially verbatim recital" which is the proper standard of law. As a matter of fact Judge Murphy frequently in his opinion used the phrase "substantially verbatim recital" in referring to the Shaw notes (200 F. Supp. 715-16).

In *Campbell* v. *United States, supra,* this Court in referring further to the Interview Report stated:

> "Although there may well be small differences as among the notes, oral presentation and Interview Report, it is not seriously suggested that there was a material variance or inconsistency among them."

Similarly, neither Judge Murphy, nor the Court below was able to find any material variance or inconsistency between the story Cantellops told Shaw and Shaw's interview notes. Shaw's notes are a "substantially verbatim recital", and were found to be so by Judge Murphy whose finding in this respect should not have been disturbed by the Court below because it was not "clearly erroneous."

The Court below stated that it was not Shaw's purpose to provide a record of Cantellops' story but to draft a chronological statement for himself and which would serve as a guide in interrogating him before a grand jury. Such a purpose would not effect their producibility under the Jencks Act.

In this connection the Court's attention is respectfully directed to the very recent decision of the United States Court of Appeals for the District of Columbia, *Williams* v. *United States,* decided October 1, 1964, and reported in United States Law Week, October 6, 1964, New Court Decisions (33 LW 2163), that the Jencks Act requires production of unsigned statements that had been orally given by prosecution witnesses to a grand jury clerk who contemporaneously recorded *"his version"* of them since they constituted "substantially verbatim" recitals. The object of the taking of the statements was to facilitate the presentation of cases to the Grand Jury by the office of the United States Attorney.

(2) Further, concerning the question of prejudice caused to the petitioner and the defense generally by the failure of the Government to produce the Shaw notes, on which Judge Murphy ruled there was no prejudice, it is very respectfully suggested that the impeachment purposes of a pre-trial statement of a witness may be better determined by defense counsel than a trial judge. And it should be observed that in the instant case, Judge Murphy was not the trial judge. It is for defense counsel, not for a trial court, to evaluate what is tactically useful for the defense in Jencks Act producible materials. *Scales* v. *United States,* 367 U.S. 203, 258; *Palermo* v. *United States,* 360 U.S. 343, 346; *Jencks* v. *United States,* 353 U.S. 657, 668-669; *Clancy* v. *United States,* 365 U.S. 312, 316.

(3) Petitioner, Nicholas Lessa, respectfully adopts all of the reasons for the granting of certiorari which are presented in the companion petitions.

CONCLUSION

For all of the reasons set forth in this petition and in the companion petitions it is respectfully submitted that a writ of certiorari should be granted.

Respectfully submitted,

HENRY K. CHAPMAN
Attorney for Petitioner
Nicholas Lessa

APPENDIX

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of October one thousand nine hundred and sixty-four.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. THURGOOD MARSHALL,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALFREDO AVILES, et al.,

Defendants,

CHARLES BARCELLONA, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk